80-1623

Office-Supreme Court, U.S.
FILED
MAR 27 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

BRAGER & COMPANY, INC.,

Petitioner,

against

LEUMI SECURITIES CORPORATION, BANK LEUMI LE-ISRAEL B.M. and BANK LEUMI TRUST COMPANY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL R. SOLIN, ESQ.
530 Fifth Avenue
New York, New York 10036
(212) 221-3760

Of Counsel:
SOLIN & BREINDEL P.C.

Questions Presented

1. Does the formation of a subsidiary by a corporation which has the effect of substantially lessening competition or tending to create a monopoly violate §7 of the Clayton Act?

2. Must the anti-competitive effect of the formation of a subsidiary occur within a limited time after the formation in order to violate §7 of the Clayton Act?

Table of Contents

	Page
Opinions Below.	1
Jurisdiction.	2
Statute Involved.	2
Statement of the Case. . .	3
Reasons for Granting the Writ.	14
Conclusion.	20

Appendices:

Appendix A: Opinion of the Second Circuit Dated December 30, 1980, Affirming the Dismissal by the District Court of the §7 Clayton Act Claim. A-1

Appendix B: Opinion of the District Court Rendered on December 6, 1979, Dismissing the

§7 Clayton Act Claim Pursuant to Defendants' Motion for a Directed Verdict (76 Civ. 4110 (EW)). B-1

Appendix C: Clayton Act §7 (15 U.S.C. §18). C-1

Table of Authorities

	Page
Cases:	
F.T.C. v. Proctor & Gamble Co., 386 U.S. 568 (1967). .	19
United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957). . . .	16,18
United States v. General Dynamics Corp., 415 U.S. 486 (1974).	17
United States v. Pabst Brewing Co., 384 U.S. 546 (1966).	19
United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964).	16
United States v. Philadelphia National Bank, 374 U.S. 321 (1963).	19

Statutes:

Clayton Act §4 (15 U.S.C. §15). 3

Clayton Act §7 (15 U.S.C. §18). 2,4,14,15,16 17,18,19,20

Clayton Act §16 (15 U.S.C. §26). 3

Sherman Act §1 (15 U.S.C. §1). 3

Sherman Act §2 (15 U.S.C. §2). 4

Other Authorities:

L.A. Sullivan, Handbook of the Law of Antitrust, §204(f) (1977). 18

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

BRAGER & COMPANY, INC.,

Petitioner,

- against -

LEUMI SECURITIES CORPORATION, BANK LEUMI LE-ISRAEL B.M. and BANK LEUMI TRUST COMPANY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is annexed hereto as Appendix A. The opin-

ion of the United States District Court for the Southern District of New York is annexed hereto as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on December 30, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

Statute Involved

Section 7 of the Clayton Act (15 U.S.C. §18) is annexed hereto as Appendix C.

Statement of the Case

A. Nature of the Action.

In September 1976, petitioner Brager & Company, Inc. ("Brager") commenced this action[1] against respondents Leumi Securities Corporation ("Leumi Securities"), its parent Bank Leumi Le-Israel B.M. ("Leumi Israel") and Bank Leumi Trust Company of New York ("Leumi New York"), which is also a subsidiary of Leumi Israel.

Brager claimed, inter alia, that: (1) in violation of §1 of the Sherman Act (15 U.S.C. §1), Leumi Securities, Leumi Israel and Leumi New York conspired to unreasonably restrain trade in the secondary Israeli bond market and, in violation

---

1. Jurisdiction in the District Court was predicated upon §§4 and 16 of the Clayton Act (15 U.S.C. §§15 and 26).

of §2 of the Sherman Act (15 U.S.C. §2), conspired to monopolize that market; (2) in violation of §2 of the Sherman Act, Leumi Securities attempted to monopolize, and monopolized, the secondary Israeli bond market; and (3) in violation of §7 of the Clayton Act (15 U.S.C. §18), the formation of Leumi Securities by Leumi Israel may have substantially lessened competition, restrained commerce, or tended to create a monopoly in the secondary Israeli bond market.

B. The Parties.

Brager is a securities broker dealer with offices in New York, New York which, since its formation in 1950, has purchased and sold Israeli bonds in the secondary Israeli bond market in the United States as a market maker.

Leumi Israel is the largest, oldest and one of the best known banks in Israel, with offices throughout the United States and the world. In 1976, Leumi Israel had assets of approximately $9,500,000,000.

In 1962 Leumi Israel formed Leumi Securities as a registered broker dealer. Since its incorporation, Leumi Securities has been wholly owned by Leumi Israel and/or subsidiaries of Leumi Israel and has maintained offices in New York, New York.

Leumi New York was similarly organized by Leumi Israel and, since its incorporation in 1968 as a New York banking and trust company, Leumi Israel has been its controlling shareholder owning approximately 85% of the stock of Leumi New York. In addition to Leumi Securities and Leumi New York, Leumi Israel owns or has owned numerous banks and other companies

throughout the world which together comprise the "Bank Leumi Group" or "Leumi Combine". In 1976, the Leumi Combine had 352 branches and offices throughout the world.

C. The Secondary Israeli Bond Market.

Israeli bonds are bonds issued pursuant to a series of separate offerings by the Government of Israel which bear interest at rates of from 3 1/2% to 5 1/2%[2] and which mature in 10 to 15 years.

The Development Corporation For Israel ("DCI") as underwriter for the Government of Israel sells Israeli bonds primarily to individuals pursuant to pro-

2. The vast majority of Israeli bonds issued and traded in the secondary Israeli bond market are 4% bonds. The 5 1/2% bonds may only be purchased by banks, insurance companies, labor unions, enumerated types of "funds" and credit unions, not by individuals.

spectuses which state that the offerings "...may have a special appeal to persons with an interest in Israel, rather than the general public".

An individual who has purchased an Israeli bond on the primary market from DCI may hold the bond until it has matured and then redeem the bond in the United States, or may sell the bond prior to maturity at a discount in the secondary market to another individual or another broker dealer.

In addition, pursuant to the terms of the bonds, an individual who has purchased an Israeli bond either in the primary or secondary markets may utilize the bond prior to maturity at par to pay for: (a) tourist expenses, up to $2500 a month, in connection with travelling to, in and from Israel by redeeming the bonds in Israel for Israeli currency if the bond has

been outstanding for more than 2 years, and (b) qualified investments in Israel, including stocks traded on the Tel Aviv Stock Exchange without monetary limitation, if the bond has been outstanding for more than 5 years.[3]

D. The Principal Market Makers/Competitors in the Secondary Israeli Bond Market.

From 1951 to 1967, the principal market makers of Israeli bonds in the secondary Israeli bond market were Brager and Carl Marks & Co. Inc. ("Marks"), although

3. Based on this distinction, those Israeli bonds which have been outstanding for more than 2 years but less than 5 years are called "tourist bonds", while those bonds which have been outstanding for more than 5 years but less than the maturity period of the bond are considered "investment bonds". Although all Israeli bonds which are held for more than 5 years become "investment" bonds, by definition all "investment" bonds can be used as "tourist" bonds. Israeli bonds are the only securities which the Government of Israel will redeem at par prior to maturity in connection with tourist expenses or qualified investments in Israel.

Leumi Securities did purchase and sell Israeli bonds during this period.

From 1967 to 1971, the principal Israeli bond market makers were Brager, Marks and Leumi Securities.

In 1971, Transmittal Securities Corporation ("Transmittal") joined Brager, Marks and Leumi Securities as a principal market maker in Israeli bonds. In addition, in or about 1971, Leumi Securities began to concentrate its operations in the secondary Israeli bond market.

Brager, Marks, Leumi Securities and Transmittal continued as the principal market makers until 1973. In 1973, Nathan Engel, Brager's former president, and his nephew Michael Engel (another former Brager employee), joined the New York broker dealer firm of Oscar Gruss & Son ("Gruss"). At Gruss, they continued their Israeli bond market making activ-

ities by forming an Israeli bond department which made a market in Israeli bonds.

From 1973 to 1976, and thereafter, the principal market makers in the secondary Israeli bond market were Brager, Marks, Leumi Securities, Transmittal and Gruss.

During the period from 1971 to 1976, the approximate market shares of the principal secondary Israeli bond market makers were as follows:[4]

Purchases (%)

	1971	1972	1973	1974	1975	1976
Brager	36	27	14	14	11	15
Leumi Sec	27	40	42	35	39	36
Marks	18	21	20	20	18	21
Transmittal	19	11	14	13	17	15
Gruss	--	--	9	13	10	9

4. No accurate market data with respect to the purchase and sale of Israeli bonds by the principal market makers was gathered for the period 1951 to 1971.

Sales (%)

	1971	1972	1973	1974	1975	1976
Brager	28	25	14	14	15	16
Leumi Sec	27	41	43	35	37	37
Marks	18	21	20	19	18	20
Trans-mittal	28	13	15	14	16	16
Gruss	--	--	8	13	10	10

In addition, during this period of time, Sekier (in New York), Rogenburg (in New York) and United Equities (in New York), each of which had previously made a market in Israeli bonds, ceased their market making activities.

It is therefore clear that commencing in or about 1971, when Leumi Securities concentrated its market making activities in the secondary Israeli bond market: (a) Leumi Securities acquired more than 40% of the secondary Israeli bond market by the end of 1973, (b) Brager lost more than one-half of its share in the secondary Israeli bond market in

those same years, (c) other than Gruss which was essentially an extension of Brager and, therefore, not a true de novo entrant, no competitor became a principal market maker in the secondary Israeli bond market, (d) the market shares of the other market makers generally remained relatively the same, and (e) at least 3 market makers left the market.

The means by which Leumi Securities acquired a 40% share of the highly concentrated secondary Israeli bond market within less than 3 years at the expense of Brager's market share, and thereby the ability to control prices in, exclude compeition from and otherwise dominate, concentrate, increase barriers to entry into and monopolize the market, was a function of, inter alia, the "deep pocket" benefits Leumi Securities derived

from being a subsidiary of Leumi Israel and a member of the Leumi Combine.

These "deep pocket" benefits included, inter alia, substantial capitalization and subsidization of Leumi Securities by Leumi Israel, major financing of Leumi Securities' Israeli bond trading activity by Leumi Israel and Leumi New York, and the "channelling"[5] of Israeli bonds and Israeli bond customers by Leumi Israel, Leumi New York and other members of the Leumi Combine to Leumi Securities.[6]

---

5. Leumi Israel wrote its subsidiaries that:

> "We draw your attention to the fact that our subsidiary, Leumi Securities Corporation in New York, makes and maintains an active market in State of Israel bonds, asking you to channel transactions in these bonds, whenever possible, through them."

6. From 1972 to 1975, members of the Leumi Combine purchased and sold $20,000,000 of Israeli bonds from and to Leumi Securities which business was, in turn, foreclosed from Brager.

Reasons for Granting the Writ

The relevant portions of §7 provide:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock... of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> * * *
>
> Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

Consequently, the express terms of §7 of the Clayton Act clearly prohibit the formation of a corporation by another corporation which results in a substantial lessening of competition, or which tends to create a monopoly, and do not require that the adverse effect on competition of the formation occur within a specified period of time after the formation.

Nevertheless, in affirming the dismissal of Brager's §7 claim, the Court of Appeals held that the formation by Leumi Israel of a subsidiary (Leumi Securities) was not within the proscriptions of §7. In addition, the Court of Appeals held that the causal connection between the formation of Leumi Securities in 1967 and the anti-competitive effects of the formation which occurred in the "early

1970s" was "too tenuous" to support §7 relief.

These holdings not only disregarded the literal terms of §7 but, more importantly, are in direct conflict with the constructions of §7 by this Court.

For example, in United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 592 (1957), this Court held that §7 applies to:

> "...any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not... whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce."

As this Court held in United States v. Penn-Olin Chemical Co., 378 U.S. 158, 168

(1964), the proscriptions of §7 have specifically not been restricted to acquisitions of the stock of an existing corporation and encompass the formation of a new corporation.

> "The test of the section [7] is the effect of the acquisition. Certainly the formation of a joint venture and purchase by the organizers of its stock would substantially lessen competition - indeed foreclose it - as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise." (emphasis supplied).

Finally, this Court has held that §7 will be violated if competition is lessened or a monopoly is tended to be created at any time after a stock acquisition occurs. United States v. General Dynamics Corp., 415 U.S. 486 (1974).

Indeed, in United States v. E.I. du Pont de Nemours & Co., supra, an acquisition was held to violate §7 when, 30 years later, the effects of the acquisition were found to have restrained commerce. As set forth in a leading antitrust treatise commenting on Dupont:

> "...a merger which was unchallenged and apparently lawful when made can later be held unlawful on the basis of post-acquisition evidence bearing either on the purpose or effect of the merger. There is no applicable statute of limitations; every merger leaves a time bomb ticking in the board room." L.A. Sullivan, Handbook of the Law of Antitrust, §204(f), at 627 (1977).

In summary, the Court of Appeals clearly erred in affirming the directed verdict of the District Court which dismissed Brager's §7 claim. The formation of Leumi Securities by Leumi Israel is within the purview of §7 and the resulting

anti-competitive effects of the formation[7] which occurred, at most, 10 years after the formation are proscribed by §7.

---

7. As a result of the financial assistance and Israeli bond business given to Leumi Securities by Leumi Israel, Leumi New York and other subsidiaries of Leumi Israel, during the period from 1962 to 1973 Leumi Securities acquired a 42% share in the secondary Israeli bond market, a 55% increase from 1971. Moreover, during this same period of time, at least 3 market makers left the secondary Israeli bond market, no de novo market makers entered the market and Brager's share in the market decreased. Consequently, the evidence more than established a possibility that competition would be lessened or a monopoly would tend to be created in the market. See United States v. Philadelphia National Bank, 374 U.S. 321 (1963) (where a 30% market share and increased market concentration were held to violate §7); United States v. Pabst Brewing Co., 384 U.S. 546, 552 (1966) ("a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in determining how substantial the anticompetitive effect of a merger may be"); and F.T.C. v. Proctor & Gamble Co., 386 U.S. 568 (1967).

Conclusion

The decision by the Court of Appeals directly conflicts with the literal provisions and the interpretations by this Court of §7 of the Clayton Act. More significantly, however, the construction of §7 by the Court of Appeals has effectively amended §7 by eliminating its express prohibition against the formation of a subsidiary where the effect of such formation at any time in the future is to substantially lessen competition or tend to create a monopoly.

To preserve the integrity of §7, it is respectfully requested that a writ of certiorari be issued to the United States

Court of Appeals for the Second Circuit in this matter.

Dated: New York, New York
March 27, 1981

Respectfully submitted,

Daniel R. Solin, Esq.
530 Fifth Avenue
New York, New York 10036
(212)221-3760

Of Counsel:

Solin & Breindel P.C.

APPENDIX

Appendix A

Opinion of the Second Circuit
Dated December 30, 1980,
Affirming the Dismissal by the District
Court of the §7 Clayton Act Claim

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of December , one thousand nine hundred and eighty.

P r e s e n t: HONORABLE JAMES L. OAKES,
HONORABLE THOMAS J. MESKILL,
Circuit Judges,
HONORABLE HENRY F. WERKER,
District Judge.* [Honorable
Henry F. Werker of the
United States District

Court for the Southern
District of New York,
sitting by designation.]

[Caption Omitted]

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Brager & Company (Brager) appeals a judgment of the United States District Court for the Southern District of New York (Weinfeld, J.) entered on a jury verdict finding that defendants had not violated §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 (1976), and upon a directed verdict that defendants had not violated

§7 of the Clayton Act, 15 U.S.C. §18 (1976).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Brager challenges the propriety of the directed verdict, certain evidentiary rulings, and the charge. We find these contentions to be without merit.

(a) The Directed Verdict

The court correctly granted a directed verdict on the §7 claim. In granting the motion, Judge Weinfeld stated, "The Court upon its own research has discovered no instance in which a subsidiary formation by a single parent was condemned under this section. . . ." (A.2605). We agree. The cases relied

upon by Brager, including United States v. Penn-Olin Chemical Co., 378 U.S. 158, 168 (1964), did not involve formation of a subsidiary by a single parent to enter a market which the parent could have entered. In Penn-Olin, two separately owned and controlled corporations that were each potential entrants into the market combined to form a new corporation which did enter that market. The Court held the action, which was in the nature of a joint venture, was violative of §7. Here, there is only one parent which was engaged in banking and securities trading in Israel; its creation of a wholly-owned subsidiary to conduct different operations in a different geographic market does not fall within Penn-Olin. Further, the district court correctly found that the causal connection between the formation of Leumi Securities Corporation

(LSC) in 1962 and the alleged injury, which did not occur until the early 1970s, when LSC began concentrating on the secondary bond market, was too tenuous to support §7 relief.

(b) The Evidentiary Rulings

We find no prejudicial error in the evidentiary rulings. Brager argues that Judge Weinfeld should have let Abramoff testify that he did not "enjoy" the April 3 meeting and that he had written the letter to avoid being driven out of business. But Abramoff had already testified at length about the threat meeting, explaining that he had written the letter to "stay on the good side" of the bank. If the jury had believed Abramoff's version of the story, it certainly would have inferred that Abramoff did not enjoy writing the letter. If it was error to

exclude this testimony, the error was harmless.

Next, Brager argues that the court erred in excluding the statement in the Jacobowitz memorandum, contending that the statement is evidence of market power and monopolistic intent. But the relevance to market power is marginal since what Jacobowitz may have thought made no difference concerning LSC's market power. The relevance to intent was also marginal, since Jacobowitz was more of a recommender than a decisionmaker. Since he did not have authority to commit either LSC or Leumi Israel to any course of conduct, his statement could have had little bearing on what LSC or Leumi Israel intended. In excluding the evidence, the court evidently believed that the prejudicial nature of the statement far outweighed its probative value. This bal-

ancing process is entrusted to the trial judge and "should not be disturbed lightly." United States v. Schiff, 612 F.2d 73, 80 (2d Cir. 1979). See generally, United States v. Robinson, 560 F.2d 507, 515 (2d Cir. 1977) (in banc) (upholding the trial judge's discretion unless he acts arbitrarily or irrationally).

Finally, the district court correctly prohibited Brager's "securities expert" from testifying that the LSC's redemption system violated the securities laws. This testimony was properly excluded on the basis of Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505, 509-10 (2d Cir.), cert. denied, 434 U.S. 861 (1977) ("it is not for witnesses to instruct the jury as to applicable principles of law, but for the judge").

(c) The Charge

Brager claims that the judge should not have said that LSC had contended that the relevant market was stocks and bonds when in fact they had not so contended. This claim is frivolous. First, LSC did argue for the broader market. Second, the court made it very clear that the jury was to decide the market issue. There can be no question that this issue was presented to the jury and decided against Brager.

Next, Brager contends that there was absolutely no evidence that securities were a reasonable substitute for secondary bonds (cross-elasticity of demand). Brager argues that, because its expert testified that there was no cross-elasticity of demand, the market issue should not have gone to the jury. No cases are cited for this bold proposition. In essence, Brager sought a directed verdict on the market issue, contending that the

jury was required to accept the opinion of its expert. That is not the law of our Circuit. See County Asphalt, Inc. v. Lewis Welding & Eng. Corp., 444 F.2d 372, 377-78 (2d Cir. 1971); Purcell v. Waterman, 221 F.2d 953, 954 (2d Cir. 1955). The issue of relevant product market was presented fairly and correctly, and was left for the jury to decide.

Brager also assails the district court's restriction of trade charge. Brager claims that the court incorrectly charged that the particular restraint on commerce must be "substantial." We reject this contention for several reasons. First, the charge now challenged was not objected to. See Cohen v. Franchard Corp., 478 F.2d 115, 122 (2d Cir.), cert. denied, 414 U.S. 857 (1973). Second, even assuming that Brager was relieved of its duty to object, the challenged charge

is substantially identical to Brager's proposal, and therefore is not now assailable. See Anley v. United Pacific Ins. Co., 379 F.2d 183, 188 (9th Cir. 1967), cert. denied, 390 U.S. 950 (1968). Third, Brager's reliance on McClain v. Real Estate Bd. of New Orleans, 444 U.S. 232 (1980), is misplaced. McClain concerned only Sherman Act jurisdiction, and jurisdiction here is not questioned. The district court's charge, taken as a whole, is a good statement of the rule of reason and fairly presented the restraint of trade issue to the jury.

Finally, Brager requested the court to charge that LSC's "redemption scheme" violated the securities laws. Even assuming that this system violated the securities laws, its relevance to the alleged antitrust violations is peripheral at best. Further, all the facts under-

lying the scheme were admitted into evidence and carefully marshalled in the court's charge. In addition, Brager's summation certainly conveyed the impression of illegality. Thus, Brager's arguments concerning the scheme went to the jury; what did not go to the jury was a definitive statement that the process was illegal. But there is no reason that a legal statement by the judge that LSC's allegedly predatory acts violated the antifraud provisions of the securities statutes regarding third parties is any more probative of anticompetitive intent than is the evidence of the allegedly predatory acts themselves. To introduce even more evidence on a tangential issue would only confuse the jury and would clearly prejudice the defendants. Under these circumstances, Judge Weinfeld correctly refused to give the requested charge.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the District Court is AFFIRMED.

/S/

James L. Oakes, U.S.C.J.

/S/

Thomas J. Meskill, U.S.C.J.

/S/

Henry F. Werker, U.S.D.J.

Appendix B

Opinion of the District Court
Rendered on December 6, 1979,
Dismissing the §7 Clayton Act
Claim Pursuant to Defendants'
Motion for a Directed Verdict
(76 Civ. 4110 (EW))

[Tr.3902] THE COURT: The court will reserve decision on the motion made by the three defendants with respect to the Section 1 and Section 2 claims under the Sherman Act.

With respect to the Section 7 Clayton Act claim, the court has previously indicated that it had substantial reservation, upon the evidence in the case, that the matter should be presented to the jury.

Brager's challenge under Section 7 of the Clayton Act to the formation by Bank Leumi Le-Israel rests upon an exception in the Act which towards the end refers to when the effect of such formation is not to substantially lessen competition.

The court upon its own research has discovered no instance in which a subsidiary formation by a single parent was condemned under this section; nor has the plaintiff directed our attention to any.

Nonetheless, even if it is conceded that some [Tr. 3903] subsidiary formations could be held to be beyond the exculpatory clause of Section 7, no evidence in this case suggests that the formation in 1962 of Leumi Securities by its parent comes within that category.

Section 7 is concerned with the effects produced by an acquisition upon the structure of a market and competition

within it. United States v. Penn-Olin Co., 387 U.S. 158, 168 (1964); Sullivan, Antitrust Section 192 (1977).

The creation of Leumi Securities involved the formation of a subsidiary by a single parent corporation which was not then or is now in competition with its subsidiary. This is fairly common occurrence in the corporate world.

Such a formation can only be regarded as affecting a de novo entry into whatever market the subsidiary undertakes to compete in.

The most salient effect on market structure of de novo entry is, of course, the addition of a new competitor to a market -- a patently pro-competitive effect. De novo entry, even by a large corporation, has never been held to be illegal. Quite to the contrary, de novo entry has been the benchmark against which the effects of acquisitions are measured.

[Tr. 3904] See, e.g., United States v. Penn-Olin Co., supra; United States v. Marine Bancorporation, Inc., 418 U.S. 602, 632-40 (1974); United States v. Falstaff Brewing Co., 410 U.S. 526 (1973).

There is nothing in the record that the formation challenged had any effect but to add Leumi Securities as a competitor to the market; incidentally, deconcentrating a market apparently dominated by plaintiff up to the time of Leumi Securities' entry in 1967.

I have already referred to the factual situation when defendant earlier made an offer of the exhibit upon the close or the resting of the plaintiff of their case.

For this reason alone, a directed verdict on this claim in favor of the de fendants is warranted.

In addition to the above, however, it may also be noted that under the facts as adduced in this case, while any effect the formation of Leumi Securities may have had was the affect of de novo entry, the link between the formation and any effect on the market whatsoever is extremely tenuous.

The subsidiary was formed in 1962. It did not enter the relevant market, as described by plaintiff, [Tr. 3905] until 1967. Thus, the effects of Leumi Securities' entry cannot be attributed to its formation but rather to its conduct and practices and the conduct of its parent after 1967 -- conduct which forms a basis of plaintiff's Sherman Act claims.

In short, there is no evidence in the case to support a connection between

the formation of the subsidiary and the conduct and effects of which plaintiff complains.

Accordingly, the defendants' motion for a directed verdict on the Clayton Act, Section 7 is granted.

Realistically, as I indicated, I believe that claim in large measure is subsumed on at least one of the other claims you have. I think the other difference would be, as Mr. Solin pointed out, if you did prevail on the claim you could ask for injunctive relief.

MR. BREINDEL: I believe we could ask for injunctive relief under the Clayton Act as well.

THE COURT: Apart from what I said, I think it lessens the burden of the jury, which has sufficient questions to consider without really complicting the matter.

Appendix C

Section 7 of the Clayton Act (15 U.S.C. §18)

§18. Acquisition by one corporation of stock of another.

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section pre-

vent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the

stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or

made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

80-1623

No. 80-1628

Office-Supreme
F I L
APR 24
ANDOR L
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BRAGER & COMPANY, INC.,

Petitioner,

v.

LEUMI SECURITIES CORPORATION, BANK LEUMI LE-ISRAEL B.M. and BANK LEUMI TRUST COMPANY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS LEUMI SECURITIES CORPORATION AND BANK LEUMI LE-ISRAEL B.M. IN OPPOSITION

STEPHEN R. STEINBERG, ESQ.
REAVIS & MCGRATH
345 Park Avenue
New York, New York 10154
(212) 486-9500

Counsel for Respondents Leumi Securities Corporation & Bank Leumi le-Israel, B.M.

Of Counsel:

LAWRENCE W. BOES
DAVID C. BIRDOFF
NATHANIEL L. GERBER

April 24, 1981

Counter-Statement of Questions Presented

1. Does § 7 of the Clayton Act prohibit a single parent corporation's formation of a subsidiary for the purpose of the subsidiary's entering *de novo* a different market, in a different geographical area, followed by supposed anti-competitive conduct of the subsidiary and parent in that market five to ten years later (but when, in fact, as found by a jury and trial court, the post-formation conduct did not violate Sherman Act §§ 1 and 2 and the subsidiary's formation and *de novo* entry actually added a competitor to the market, thus deconcentrating a market apparently dominated by one firm up to the time of the subsidiary's entry)?

2. Does § 7 of the Clayton Act prohibit a single parent corporation's formation of a subsidiary when there is no showing of a causal connection between the subsidiary's formation and the alleged subsequent anti-competitive conduct of the parent and subsidiary?

TABLE OF CONTENTS

PAGE

Counter-Statement of Questions Presented i

Table of Authorities iii

Preliminary Statement 1

Opinions Below 2

Counter-Statement of The Case 3

A. Nature of the Action 3

B. The Parties 4

C. Growth in the Secondary Market for Israel Bonds 6

D. Market Shares 8

Reasons for Denying The Writ 8

A. Neither the Decision Below nor the Record Support the Questions Presented in the Petition 8

B. *De Novo Entry* into a Market by the Subsidiary of a Single Parent is Pro-Competitive 9

Conclusion 15

Appendices

Appendix A: Subsidiaries of Respondent Bank Leumi le-Israel B.M. and Affiliates of Respondent Leumi Securities Corporation A-1

Appendix B: Undisputed Findings of Fact Admitted in Evidence B-1

Table of Authorities

Cases: PAGE

Brager & Co., Inc. v. *Leumi Securities Corp.*, 429 F. Supp. 1341 (S.D.N.Y. 1977) 4, 4n

Brager & Co., Inc. v. *Leumi Securities Corp.*, 84 F.R.D. 220 (S.D.N.Y. 1979) 4n

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) 15

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 14, 15

Purex v. *Procter & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979) 14

United States v. *Citizens and So. Nat'l Bank*, 422 U.S. 86 (1975) 11n

United States v. *Connecticut Nat'l Bank*, 418 U.S. 656 (1974) 12

United States v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) 11n, 12n

United States v. *General Dynamics Corp.*, 415 U.S. 486 (1974) 9, 12n

United States v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) 3, 10n

Statutes:

Clayton Act § 7 (15 U.S.C. § 18) ..... *passim*

Sherman Act § 1 (15 U.S.C. § 1) ..... *passim*

Sherman Act § 2 (15 U.S.C. § 2) ..... *passim*

New York Banking Law §§ 200 *et seq.* 11n

Other Authorities:

Rule 56(d), Federal Rules of Civil Procedure 4n

Rule 28.1, Rules of the Supreme Court of the United States 1n

No. 80-1628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BRAGER & COMPANY, INC.,

Petitioner,

v.

LEUMI SECURITIES CORPORATION, BANK LEUMI LE-ISRAEL B.M. and BANK LEUMI TRUST COMPANY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS LEUMI SECURITIES CORPORATION AND BANK LEUMI LE-ISRAEL B.M. IN OPPOSITION

Preliminary Statement

Leumi Securities Corporation ("Leumi Securities") and Bank Leumi le-Israel B.M. ("Leumi-Israel"), defendants in this antitrust action,[1] respectfully request that this Court deny the petition of Brager & Co., Inc. ("Brager") for a writ of certiorari. Brager seeks review of the judgment and unreported opinion of the Court of Appeals for

[1] In accordance with Rule 28.1 of the Rules of the Supreme Court of the United States the subsidiaries and affiliates of Leumi-Israel, and the parent and affiliates of Leumi Securities are set forth in Appendix A hereto. Leumi-Israel has no parent corporation and its subsidiary Leumi Securities no subsidiaries.

the Second Circuit (Petition, App. A) affirming the order and opinion of the United States District Court for the Southern District of New York (Edward Weinfeld, J.) (Petition, App. B), granting a directed verdict for defendants on Brager's Clayton Act § 7 claim (15 U.S.C. § 18) which preceded a jury verdict for defendants on Brager's Sherman Act §§ 1 and 2 claims (15 U.S.C. §§ 1, 2).

Opinions Below

Brager claimed that Leumi-Israel's formation in 1962 of a New York subsidiary, Leumi Securities, a registered broker-dealer, and the alleged subsequent conduct of Leumi-Israel and Leumi Securities following Leumi Securities' entry into the so-called "secondary Israel bond market" beginning in 1967, as well as its monopolization of that market beginning in 1971, violated § 7 of the Clayton Act.

District Judge Edward Weinfeld, after having heard all the evidence presented before the jury, dismissed the Clayton Act § 7 claim on the grounds that: "no instance" could be discovered "in which a subsidiary formation by a single parent was condemned under this section"; the parent company "was not then or is now in competition with its subsidiary", thus making the subsequent entry five years later into the secondary Israel bond market a *de novo* entry; the effect of this *de novo* entry was "the addition of a new competitor to a market—a patently pro-competitive effect", "incidentally, deconcentrating a market apparently dominated by plaintiff [Brager] up to the time of Leumi Securities' entry in 1967"; and "the effects of Leumi Securities' entry cannot be attributed to its formation but rather to its conduct and practices and the conduct of its parent after 1967—conduct which forms a basis of plaintiff's Sherman Act claims." (Petition, pp. B-2-5.)

The Sherman Act claims were tried to and decided by the jury against Brager. The jury rendered a special verdict that Brager failed to prove both a conspiracy to restrain trade in violation of Sherman Act § 1 and monopolization, attempt to monopolize, and conspiracy to monopolize in violation of Sherman Act § 2. (Petition, p. A-2.)

Brager appealed to the United States Court of Appeals for the Second Circuit challenging various evidentiary rulings, Judge Weinfeld's jury instructions, and the directed verdict on the § 7 claim. The Court of Appeals affirmed the judgment of the District Court in all respects. In a unanimous, unreported opinion, the court (Oakes and Meskill, C.JJ., and Werker, D.J., sitting by designation) agreed that the formation of a subsidiary by a parent corporation "to conduct different operations in a different geographic market does not fall within" *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). The Court of Appeals also held that "the district court correctly found that the causal connection between the formation of Leumi Securities Corporation . . . in 1962 and the alleged injury, which did not occur until the early 1970's, when [Leumi Securities] began concentrating on the secondary [Israel] bond market, was too tenuous to support § 7 relief." (Petition, pp. A-3-5.)

Counter-Statement of the Case

A. *Nature of the Action*

Brager, a registered broker-dealer specializing in trading in State of Israel bonds ("Israel bonds") and other Israeli securities in the secondary market, commenced this action in 1976 against Leumi Securities, also a registered broker-dealer, and its parent and affiliate, Leumi-Israel and Bank Leumi Trust Company of New York ("Leumi-New York"). Brager alleged that the defendants violated §§ 1 and 2 of

the Sherman Act and § 7 of the Clayton Act, in trading in Israel bonds in the secondary market.[2]

At the heart of Brager's case was an alleged "deep-pocket" conspiracy between Leumi Securities and its parent, Leumi-Israel, which allegedly restrained trading in the secondary market for Israel bonds. These allegations were characterized by the District Court (Weinfeld, J.) as follows:

> In essence, plaintiff asserts that Leumi Israel, the deep-pocket parent, through the facilities of Leumi New York, has enabled Leumi Securities to engage in anticompetitive activities with the result that it has displaced plaintiff [Brager] from its former position of leadership [in trading in Israel bonds], foreclosed the new firms from entering the business and prevented existing firms from expanding their share of the [so-called secondary Israel bond] market.

Brager & Co., Inc. v. *Leumi Securities Corp.*, 429 F. Supp. 1341, 1344 (S.D.N.Y. 1977).

B. *The Parties*

Plaintiff Brager was incorporated in 1960 to develop American investment in Israeli securities and bonds. (App. B, FF 7.[3]) According to Brager's own evidence, it had

---

[2] A Clayton Act § 7 claim against Leumi-New York was dismissed by the District Court with Brager's consent. *Brager & Co., Inc.* v. *Leumi Securities Corp.*, 429 F. Supp. 1341, 1350 (S.D. N.Y. 1977).

[3] "FF ...." refers to findings of fact made by the District Court pursuant to Fed. R. Civ. P. 56(d) in ruling on the parties' cross-motions for summary judgment. *Brager & Co., Inc.* v. *Leumi Securities Corp.*, 84 F.R.D. 220 (S.D.N.Y. 1979). Although the cross-motions were denied, the District Court made 142 findings of fact which were deemed established and admitted into evidence for purposes of the trial. For the convenience of this Court, these findings of fact are set forth in Appendix B hereto.

gained about 60% of the trading in Israel bonds in 1968. (*See* p. 8 n.6, *infra.*)

Leumi-Israel, a large Israeli bank, was and is the controlling shareholder of Leumi Securities, organized in 1962, and of Leumi-New York, a banking and trust company incorporated in 1968 under the New York Banking Law. Leumi-Israel and Leumi-New York were never market makers for Israel bonds, nor did they ever hold themselves out as, nor were they ever, competitors of Leumi Securities in any market. (App. B, FF 1, 3, 75-76.)

Leumi Securities was formed by Leumi-Israel for the purpose of creating a market for Israel securities (*not including Israel bonds*) in the United States. Until 1967, its principal activity was trading in Israeli and American equity securities; its trading in Israel bonds was minimal. Although it became a market maker in the secondary Israel bond market in 1967, Leumi Securities' principal activity remained, through at least the end of 1969, the trading in equity securities. (App. B, FF 4-6, 78, 85-86.)

In late 1970 or early 1971, Leumi Securities' board decided to terminate its trading activities in American securities because, *inter alia,* trading in American securities was inconsistent with its purpose which had always been the promotion of American equity investment in Israel. (App. B, FF 91.)

Leumi Securities was not subsidized by the Leumi banks. Indeed, Judge Weinfeld determined that "Leumi-New York has never subsidized or otherwise provided funds to Leumi Securities" (App. B, FF 103) and that Leumi-New York's loans to Leumi Securities were repaid with interest and were "predicated on a thorough evaluation of Leumi Securities and its financial status by Leumi-New York's Credit Committee". (App. B, FF 105.)

An arms-length relationship also existed between Leumi Securities and Leumi-Israel. For example, in 1973 Leumi Securities obtained a secured line of credit from Leumi-Israel for which it paid a higher rate of interest than it would have paid to a New York bank. "In connection with this line of credit, [Judge Weinfeld found] Leumi Securities was not given special treatment." (App. B, FF 109-10.)

There was no policy of exclusive dealing between Leumi Securities and Leumi-Israel and its other subsidiaries, nor did the Leumi banks exert any influence or compulsion upon their customers to transact business through Leumi Securities. Notwithstanding Leumi-Israel's letter[4] to its subsidiaries suggesting that they refer business to Leumi Securities (Petition, p. 13 n.5), Leumi-Israel and its subsidiaries continued to deal with Leumi Securities' competitors. For example, between 1972 and 1976, Leumi-Israel and its subsidiaries transacted over $83.4 million of securities business with American broker-dealers, of which approximately $60,000 was transacted with Leumi Securities. (*See e.g.*, App. B, FF 121-25.) Between 1971 and 1976, a Leumi-Israel subsidiary engaged in over $1 million in Israel bond transactions with Carl Marks and Co.; from 1973 through 1976, another Leumi-Israel subsidiary conducted over $280,000 in Israel bond transactions with Oscar Gruss & Co., whereas it had no transactions in that period with Leumi Securities. (See Joint Appendix filed in the Court of Appeals for the Second Circuit, pp. A. 1167, 1192, 1219, 1309, 1935-42, 1955-66, 2674, 2717.)

C. *Growth in the Secondary Market for Israel Bonds*

From 1967 to 1976, $3.05 billion of Israel bonds were offered for sale in the primary market, as compared to

---

[4] The letter was written in 1975, eight years after Leumi Securities became a market maker for Israel bonds and four years after the onset of the alleged monopoly period (i.e., 1971-76).

$1.15 billion offered prior to 1967. This growth in the primary market resulted in increased trading in the secondary market.[5] As the secondary market grew, so did the number of competitors. The following broker-dealers were the principal market makers during the periods indicated:

1951-1967	*Two market makers:* Brager and Carl Marks & Co.
1967-1971	*Three market makers:* Brager, Carl Marks & Co. and Leumi Securities
1971-1973	*Four market makers:* Brager, Carl Marks & Co., Leumi Securities and Transmittal Securities Corp.
1973-1978	*Five market makers:* Brager, Carl Marks & Co., Leumi Securities, Transmittal Securities Corp., and Oscar Gruss & Co. (App. B, FF 12.)

From 1967 through 1979, other broker-dealers competed in the secondary Israel bond market as well, including at least four other firms. (*See* App. B, FF 11, 13, 15.) In sum, the secondary Israel bond market was an open one with no barriers to entry.

---

[5] Brager's inability to compete effectively in the growing secondary market during the 1970's had nothing to do with Leumi Securities' activities. The evidence overwhelmingly demonstrated that any difficulties Brager encountered in competing as a broker-dealer were caused by the inexperience, mismanagement and inefficiency of Michael and Louise Abramoff, who seized control of Brager in 1973, fired its experienced Israel bond traders and misused Brager for the sake of personal gain, causing loss of its bank credit, incurrence of substantial liabilities, depletion of assets and difficulties in complying with the net capital rule of the Securities and Exchange Commission. (App. B, FF 33, 34, 35, 40, 41, 50-52, 55-69, 72.) In sum, Brager's alleged inability to compete was the result of poor management.

D. *Market Shares*

Statistical evidence introduced by Brager showing the various competing market makers' percentages of Israel bond purchases[6] is directly contrary to the assertion in Brager's petition that Leumi Securities acquired a 40% market share "within less than 3 years" following its alleged decision in 1971 to concentrate in Israel bonds. (Petition, pp. 11-12.) During the claimed monopoly period (1971-1976) Leumi Securities' market share never exceeded 41.6% and averaged 36.7% whereas during the preceding three years (1968-1970), it had reached 43.8% and had averaged 40.73%. (*See* n.6 below.)

Reasons for Denying the Writ

A. *Neither the Decision Below Nor the Record Support the Questions Presented in the Petition.*

Brager's Questions Presented are predicated upon its unfounded conclusions that Leumi-Israel's formation of Leumi Securities (1) substantially lessened competition, (2) tended to create a monopoly, and (3) had an anti-competitive effect, in violation of Clayton Act § 7. The jury's verdict under Sherman Act §§ 1 and 2, which was based on the same evidence presented in support of the

---

[6]

	LSC	*Brager*	*Carl Marks*	*Trans-mittal*	*Oscar Gruss*	*Ken-nedy Cabot*	*Freeh-ling*
1968	40.4	59.6					
1969	43.8	56.2					
1970	38.0	62.0					
1971	23.4	36.5	17.3	22.8			
1972	38.9	27.9	20.7	12.5			
1973	41.6	14.7	18.8	14.7	10.2		
1974	36.7	14.3	17.8	13.0	11.4	6.8	
1975	40.2	12.2	16.0	16.9	9.0	4.3	1.4
1976	39.4	14.6	19.2	16.0	8.0	2.1	.7

(Trial Exhibit introduced in evidence by Brager. See Joint Appendix filed in the Court of Appeals for the Second Circuit, p. A. 1046.)

§ 7 claim and which is not challenged in this Court, proved the contrary. In view of the jury's factual determination, the lower courts' proper determinations of the applicable law and the facts established at trial, this case does not present any questions of public importance and does not merit review by this Court.

Although Brager argues that evidence of anticompetitive effects actually occurring after a corporate merger or acquisition is probative of a violation under § 7, citing *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 504-506 (1974), it ignores the factual determinations already made by the jury and trial court, as affirmed, that there was no actual anticompetitive conduct subsequent to the formation of Leumi Securities in 1962 and that there was little if any, or an "extremely tenuous", connection between Leumi Securities' formation in 1962 and subsequent alleged anticompetitive conduct beginning in 1971, nine years later.

In *General Dynamics,* the district court properly considered post-acquisition evidence of the changing structure of the coal industry to indicate the lack of any probable anticompetitive effect of the acquisition. Certainly here, the jury's verdict and the trial court's determination as to the lack of any anticompetitive conduct or effect and the lack of any causal connection between the subsidiary's formation in 1962 and alleged effects beginning in 1971, is also properly given due consideration under § 7 in determining negatively "whether the probability of such *future* impact exists. . . ." 415 U.S. at 505.

B. *De Novo Entry Into a Market by the Subsidiary of a Single Parent Is Pro-Competitive.*

Notwithstanding the jury's determination that there were no violations of §§ 1 and 2 of the Sherman Act, Brager seeks to have this Court hold, for the first time, that a

single corporation's formation of a subsidiary and the subsidiary's *de novo* entry into different economic and geographic markets, violates § 7 of the Clayton Act. Brager cites no authority for this proposition; indeed, decisions of this Court indicate to the contrary.

Judge Weinfeld's reasoning in dismissing the § 7 claim amply demonstrates the illogic of Brager's position. As stated by Judge Weinfeld:

> Brager's challenge under Section 7 of the Clayton Act to the formation [of Leumi Securities] by Bank Leumi le-Israel rests upon an exception in the Act which towards the end refers to when the effect of such formation is not to substantially lessen competition.
>
> The court upon its own research has discovered no instance in which a subsidiary formation by a single parent was condemned under this section; nor has the plaintiff directed our attention to any.
>
> Nonetheless, even if it is conceded that some subsidiary formations could be held to be beyond the exculpatory clause of Section 7, no evidence in this case suggests that the formation in 1962 of Leumi Securities by its parent comes within that category.
>
> Section 7 is concerned with the effects produced by an acquisition upon the structure of a market and competition within it. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 168 (1964); Sullivan *Antitrust* Section 192 (1977).
>
> The creation of Leumi Securities involved the formation of a subsidiary by a single parent corporation which was not then or is now in competition with its subsidiary. This is a fairly common occurrence in the corporate world.[7]

---

[7] Brager's reliance on *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), is misplaced (Petition, pp. 16-17); that case

Such a formation can only be regarded as affecting a *de novo* entry into whatever market the subsidiary undertakes to compete in.

The most salient effect on market structure of *de novo* entry is, of course, the addition of a new competitor to a market—a patently pro-competitive effect. *De novo* entry, even by a large corporation, has never been held to be illegal. Quite to the contrary, *de novo* entry has been the benchmark against which the effects of acquisitions are measured.[8]

---

did not concern, as here, the formation of a subsidiary corporation by a single company. In *Penn-Olin*, two separately owned and controlled corporations that were each potential entrants into a market combined to form a corporate joint venture which then entered that market. Thus, the potential entrants into that market were reduced, by agreement among established competitors, from two to one. (All footnotes added.)

[8] The fact that this case involves not a dominant firm's acquisition of an existing corporate enterprise in a related market, but the formation of a subsidiary for *de novo* entry into a different market in a different area distinguishes it from *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). That opinion held unlawful under § 7 du Pont's acquisition of GM stock, thus achieving a controlling influence over its policies, when it was obvious from contemporaneous facts as found by the District Court that du Pont not only could, but probably would, influence GM to buy du Pont products over those of other suppliers *by reason of du Pont's stock ownership*. This stock ownership influence by du Pont as a supplier of automotive materials over GM as a major automobile manufacturer is described in detail in the Court's opinion as a *"probable"* effect of the acquisition. *See* 353 U.S. at 598-607 (emphasis supplied).

Here, no such vertical or horizontal relationships exist. In fact, the formation by Leumi-Israel of an American broker-dealer subsidiary in 1962, similar to internal expansion that would be wholly outside the scope of § 7, was only a *formal* necessity of, *inter alia*, New York State law which contains no authorization for a foreign bank to operate as a broker-dealer. *See* New York Banking Law §§ 200 *et seq.* There is no reason why separate incorporation of a subsidiary for purposes of legally enabling it to achieve *de novo* entry into a different business in a different area should "lessen competition" within the meaning of § 7. *See United States* v. *Citizens and So. Nat'l. Bank*, 422 U.S. 86, 119-21 (1975).

See e.g., United States v. *Penn-Olin Co.*, [378 U.S. 158 (1964)]; *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 632-40 (1974); *United States* v. *Falstaff Brewing Co.*, 410 U.S. 526 (1973) [*See also United States* v. *Connecticut Nat'l Bank*, 418 U.S. 656 (1974)].

There is nothing in the record that the formation challenged had any effect but to add Leumi Securities as a competitor to the market; incidentally, deconcentrating a market apparently dominated by plaintiff up to the time of Leumi Securities' entry in 1967.

• • •

For this reason alone, a directed verdict on this claim in favor of the defendants is warranted.

In addition to the above, however, it may also be noted that under the facts as adduced in this case, while any effect the formation of Leumi Securities may have had was the effect of a *de novo* entry, the link between the formation and any effect on the market whatsoever is extremely tenuous.

The subsidiary was formed in 1962. It did not enter the relevant market, as described by plaintiff, until 1967. Thus, the effects of Leumi Securities' entry cannot be attributed to its formation but rather to its conduct and practices and the conduct of its parent after 1967—conduct which forms the basis of plaintiff's Sherman Act claim.[9]

---

[9] Brager urges that a § 7 violation can be predicated upon the lingering effects of a subsidiary's formation taking effect long after the time of formation. (Petition, at pp. 17-19.) None of the cases cited by Brager support this proposition. (Petition, pp. 15-17.) *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974), did not concern the formation of a subsidiary but a horizontal acquisition in which both the acquiring and acquired companies were in the same line of commerce. It is undisputed, however, that Leumi-Israel has never been in the same line of commerce as Leumi Securities. As noted above, *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), also did not

> In short, there is no evidence in the case to support a connection between the formation of the subsidiary and the conduct and effects of which plaintiff complains. [Petition, pp. B-2-6. References to trial transcript omitted.]

The Second Circuit agreed with Judge Weinfeld stating:

> The court correctly granted a directed verdict on the § 7 claim. In granting the motion, Judge Weinfeld stated, "The Court upon its own research has discovered no instance in which a subsidiary formation by a single parent was condemned under this section . . . ." . . . We agree. The cases relied upon by Brager, including *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 168 (1964), did not involve formation of a subsidiary by a single parent to enter a market which the parent could have entered. In *Penn-Olin*, two separately owned and controlled corporations that were each potential entrants into the market combined to form a new corporation which did enter that market. The Court held the action, which was in the nature of a joint venture, was violative of § 7. Here, there is only one parent which was engaged in banking and securities trading in Israel; its creation of a wholly-owned subsidiary to conduct different operations in a different geographic market does not fall within *Penn-Olin*. Further, the district court correctly found that the causal connection between the formation of Leumi Securities Corporation (LSC) in 1962 and the alleged

---

concern the formation of a subsidiary for purposes of *de novo* entry, but a vertical acquisition in which anticompetitive purpose and effect were immediately apparent. There, the acquiring firm was in the relevant line of commerce in which competition was affected when the acquisition occurred. Leumi-Israel has never been in the relevant line of commerce claimed by Brager, and Leumi Securities did not enter that line until five years after its formation, when it made a *de novo* entry.

> injury, which did not occur until the early 1970's when ISC began concentrating on the secondary bond market, was too tenuous to support § 7 relief. [Petition, pp. A-3-4.]

Brager failed to establish that any lessening of competition, which allegedly occurred sometime between 1971 and 1976, was caused by anticompetitive acts or effects directly flowing from Leumi Securities' formation in 1962. *See Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Purex Corp.* v. *Procter & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979).

As stated in *Brunswick*, 429 U.S. at 489:

> We therefore hold that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury casually linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect of the violation or of the anticompetitive acts made possible by the violation. It should, in short, "be the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. [100] at 125 [1969]. (Footnote omitted.)

The lower courts correctly applied this Court's prior decisions in dismissing Brager's Clayton Act § 7 claim. There was no evidence that the formation of Leumi Securities by Leumi-Israel in 1962 was the cause of any alleged unlawful conduct or anticompetitive effect from 1971 to 1976 after Leumi Securities' *de novo* entry into the secondary Israel bond market in 1967. There was no proof that Leumi Securities was formed for an anticompetitive

purpose, or that the formation had an anticompetitive effect. Merely because Brager was no longer the prime force in the alleged market provides no cause for affording it relief under § 7; the antitrust laws are designed to protect competition not competitors. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962).

CONCLUSION

For the reasons stated above, there are no tenable grounds for granting a writ of certiorari in this case, the merits of which were effectively doomed by the jury's verdict for defendants on the Sherman Act claims and by Judge Weinfeld's decision on the Clayton Act claim, as affirmed by the Second Circuit. Therefore, it is respectfully submitted that Brager's petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN R. STEINBERG, ESQ.
REAVIS & MCGRATH
345 Park Avenue
New York, New York 10154
(212) 486-9500
Counsel for Respondents
Leumi Securities Corporation
& Bank Leumi le-Israel, B.M.

Of Counsel:

LAWRENCE W. BOES
DAVID C. BIRDOFF
NATHANIEL L. GERBER

APPENDIX

APPENDIX A

SUBSIDIARIES OF BANK LEUMI LE-ISRAEL B.M. AND AFFILIATES OF LEUMI SECURITIES CORPORATION.

Africa-Israel Investments Ltd.

Aliva-Leumi Bank Ltd.

Arab-Israel Bank Ltd.

Bank Leumi Investment Company Ltd.

Bank Leumi le-Israel (France)

Bank Leumi le-Israel (Switzerland)

Bank Leumi Trust Company of New York

Bank Leumi (U.K.) Limited, London

General Mortgage Bank Ltd.

Leumi and Company Investment Bankers Ltd.

Leumi Insurance Holdings Ltd.

Leumi International Investments Ltd.

Maoz Insurance Company Ltd.

Migdal Insurance Company Ltd.

Otsar La'Taasiya Ltd.

Sela Insurance Company Ltd.

Union Bank of Israel Ltd.

Yaad Agricultural Development Bank Ltd.

APPENDIX B

Undisputed Findings of Fact Admitted in Evidence

1. Defendant, Bank Leumi le-Israel, B.M. ("Leumi-Israel") is the largest, oldest and one of the best known banks in Israel. It has numerous branches in Israel as well as subsidiary banks and branches in the United States, the United Kingdom, Switzerland, France, Belgium and representative offices in various other parts of the world including Latin America. In 1975, Leumi-Israel opened branch offices in Chicago, Illinois and Los Angeles, California. Leumi-Israel is the parent corporation and controlling and majority stockholder of defendant Leumi Securities Corporation ("Leumi Securities") and at present as well as for the past several years has been the sole stockholder of Leumi Securities.

2. Bank Leumi Trust Company of New York ("Leumi-New York") is a banking and trust company incorporated under the Banking Law of the State of New York with its principal place of business at 579 Fifth Avenue, New York, New York. At the time of its incorporation, in July 1968, Leumi-New York was known as First Israel Bank and Trust Company of New York. Its name was subsequently changed in the late spring, 1973, from First Israel Bank and Trust Company of New York to Bank Leumi Trust Company of New York.

3. Leumi-New York was organized in July 1968, by Leumi-Israel, which since that time has been the principal and controlling stockholder of Leumi-New York owning approximately 85% of the outstanding stock, and a group of other investors, for the purpose of establishing a commercial bank with trust powers under the Banking Law of the State of New York.

4. On May 29, 1962, the Board of Directors of Leumi-Israel approved the formation of Leumi Securities and thereafter on June 8, 1962, Leumi-Israel caused Leumi Securities to be incorporated under the Laws of the State of New York. From its inception, Leumi Securities has been wholly owned by Leumi-Israel and/or by other subsidiaries of Leumi-Israel.

5. Leumi Securities was formed for the purposes of creating a market in the United States for Israeli securities, other than bonds.

6. Leumi Securities was not formed for the purpose of making a market in Israel bonds.

7. Brager & Co. Inc. was incorporated in 1960 by Harry Brager and a group of a dozen or more American businessmen, who were all dedicated to the State of Israel. Thus, the basic purpose for which Brager was formed was the very same purpose for which Leumi Securities was formed, that is, to aid the sale to Americans of investment in Israeli companies and projects.

8. State of Israel Bonds ("Israel Bonds") are interest-bearing bonds issued by the State of Israel which mature in 10, 12 or 15 years and are sold to individuals and institutions throughout the world. These sales constitute the primary market. Sales of Israel bonds in the primary market are made through an underwriter, Development Corporation for Israel or its predecessor, which has offices in the United States, Canada, Europe and Latin America.

9. In addition to sales to individuals and institutions in the primary market, Israeli bonds are purchased and

sold by individuals, institutions and broker dealers in an "after" market or secondary market.

10. In the secondary market, Israel bonds are designated either as tourist bonds or investment bonds. Tourist bonds are those bonds that have been issued for less than five years; investment bonds are those bonds that have been issued for at least five years. Investment bonds may be redeemed at face value plus accrued interest if the proceeds are used in connection with investments in Israel. Tourist bonds may be redeemed at face value plus accrued interest (up to a certain amount) if the proceeds are used in connection with certain expenses in Israel.

11. During the years in or about 1962 until in or about 1967, the market makers in Israel bonds included Brager, Leumi Securities, and Carl Marks & Company. At times during the period 1967 through in or about 1977, the market makers in Israel bonds were Leumi Securities, Carl Marks & Company, Oscar Gruss and Son, Freehling & Company ("Freehling"), Transmittal Securities Corporation, Kennedy, Cabot & Co. and Preferred Investors. Plaintiff claims to be a market maker during that period.

12. The following broker dealers were, and are, the principal market makers in the secondary Israeli bond market during the indicated periods:

1951-1967	Brager and Carl Marks & Co. Inc.
1967-1971	Brager, Carl Marks & Co. Inc., Leumi Securities
1971-1973	Brager, Carl Marks & Co. Inc., Leumi Securities, Transmittal Securities Corporation

Appendix B

1973-1978	Brager, Carl Marks & Co. Inc., Leumi Securities, Transmittal Securities Corporation, Oscar Gruss & Son.

13. Freehling is a broker-dealer located in Chicago, and makes a market in State of Israel bonds. Its Israel bond business has grown continually since 1967 and it became a market maker for Israel bonds in 1974.

14. Freehling does not advertise to obtain Israeli bond customers. Most of Freehling's business results from referrals to Freehling by banks or the Development Corporation for Israel, i.e., the Israeli bond office.

15. United Equities was a market maker in Israel bonds from 1962 until 1967.

16. Most of Brager's customers in State of Israel bonds are "one shot" trades.

17. Prior to 1965, Brager had been a member of the Tel Aviv stock exchange. In that year, it terminated its activities and transferred them to the Japhet Bank, which was to represent Brager's interest in conducting trades on the Tel Aviv stock exchange. At the close of daily trading on the Tel Aviv stock exchange, the Japhet Bank cabled Brager of the closing price on any securities Brager was interested in.

18. In 1963, Brager decided to expand its operations by becoming associated with an Israeli bank so as to have the benefits of the services thereof.

19. In January 1964, Brager entered into a Letter of Intent with Jacob Japhet & Company, Ltd., an Israeli bank

(the "Japhet Bank") whereby that bank would acquire "a substantial interest in Brager".

20. Brager expected that the Japhet Bank would contribute to Brager's operations by bringing in its international clientele, its experience and resources, as well as a full line of banking services.

21. The Letter of Intent which was approved by Brager's Executive Committee at a January 22, 1964 meeting, provided for the purchase by the Japhet Bank of a minimum of 45,000 shares, and up to 50 percent of Brager's common stock, at which time it could elect two persons to Brager's board of directors.

22. By June 2, 1964 (four years after Brager's formation) the Japhet Bank had acquired a 25 percent ownership of the outstanding Class A Common Stock of Brager and at a special meeting of the board of directors of Brager held that day, Mr. Samuel Scherr, a director of the Japhet Bank, was elected to Brager's board. Japhet Bank is still listed as a shareholder of Brager in Brager's filings with the Securities and Exchange Commission.

23. In 1964, Nathan Engel, then in the employ of the Japhet Bank, became employed by Brager's President and acted as such until in or about March 1973.

24. Harry Brager died in 1966 and thereafter in 1967 Nathan Engel became Brager's president and acted as such until in or about March 1973.

25. During Mr. Engel's tenure as president, Brager engaged in various securities related activities including

acting as a market maker in American and Israel securities and State of Israel bonds and as an underwriter.

26. On several occasions, Mr. Engel of Brager offered to purchase Leumi Securities' business.

27. In 1971, the Japhet Bank sold its interest in Brager to H. Kook & Company, Inc., which was then owned and controlled by Michael Abramoff.

28. Mr. Abramoff assumed an active role in the management of Brager immediately upon Kook's having purchased the Japhet Bank's interest in Brager.

29. In 1971 or 1972, Engel and Abramoff agreed that Brager's offices would be moved to a new location at 767 Fifth Avenue, New York, New York where both Brager and H. Kook and Company would maintain their business premises within the same office space. It was further agreed that certain expenses of the operation of both businesses would be shared. Brager then moved its offices to the new location. During the period between the acquisition of H. Kook & Company's interest in Brager and approximately March 1973, Michael Abramoff and his wife, Louise Abramoff, were involved in Brager's activities in American Securities.

30. Prior to early 1973, all of Brager's Israel bond business was carried on by Nathan Engel and his chief assistant, Michael Engel, who was Nathan's nephew.

31. During Mr. Engel's tenure with Brager, it had a line of credit of $300,000 with American Bank and Trust Company; had a line of credit or received loans from the Israel Discount Bank as high as $400,000; and had a line of

credit with Leumi-Israel's then New York branch of at least $365,000.

* * *

33. In late 1972, Mr. Abramoff purchased additional shares in Brager from various third parties. In February 1973 a new board of directors for Brager, excluding Mr. Engel, was elected; that board consisted of Michael Abramoff, Louise Abramoff, and Joseph Abramoff, Michael Abramoff's brother. The board then passed a resolution which gave the Abramoffs, and not Mr. Engel, exclusive control of Brager's bank accounts. Mr. Abramoff then had his attorneys advise Mr. Engel that he was fired.

34. As a result of Abramoff's firing of Mr. Engel, Mr. Engel wrote to the various banks at which Brager had lines of credit, and either terminated his liability on personal guarantees he had given for Brager's indebtedness or advised the banks that they would be acting at their peril if they honored withdrawals in reliance upon a corporate resolution at the Special Meeting of February 9, 1973.

35. As a result of Mr. Engel's letters, various banks ceased their relationship with Brager and the Israel Discount Bank, in particular, closed Brager's checking account and lapsed its regular line of credit in the amount of $400,000 and informed Brager that it would only lend it money on an offering basis, which means in essence, that the bank would review and pass upon each particular loan which was requested by Brager.

36. In March 1973, Messrs. Engel and Abramoff resolved their difference in various agreements pursuant to which Mr. Abramoff purchased Mr. Engel's shares in

Brager. Despite this, Brager's line of credit of $400,000 was not renewed by the Israel Discount Bank because of Brager's change in management. Those agreements provided, among other things, that by December 31, 1973, Mr. Abramoff would cause a merger between Kook and Brager and a stock dividend to be paid to all stockholders other than Mr. Abramoff and Kook. No dividend was paid and such a merger did not occur.

37. Mr. Engel insisted upon the inclusion in the agreement of the provisions referred to in paragraph 36, because the merger between Kook and Brager would, in effect, eliminate Kook's indebtedness in the amount of $80,000 to Brager and the additional stock dividend would provide Brager's outside stockholders with a share of that recovery.

38. As part of the resolution of their disputes, Abramoff exacted from Engel a restrictive covenant agreement which provided in essence that Engel could not start up his own Israel bond business or work for another Israel bond dealer in the metropolitan area for a period of six months.

39. Prior to in or about March 1973, Brager had a line of credit, or received forms from the Israel Discount Bank as high as $400,000.

40. Brager's line of credit with Israel Discount Bank was closed. Mr. Abramoff requested, on behalf of Brager, that it be restored. (Mr. Abramoff was Brager's President at the time).

41. In March 1973 Messrs. Engel and Abramoff resolved their differences in various agreements pursuant to which Mr. Abramoff purchased Mr. Engel's shares in Brager. In

or about March or April 1973, Brager's request for a line of credit with the Israel Discount Bank was denied; the Bank decided to proceed for the immediate future on an offering basis. Brager's regular line of credit of $400,000 had been lapsed due to the change in management of Brager.

42. During Engel's tenure at Brager, Leumi-Israel and Brager engaged in numerous transactions with one another, including the purchase and sale of Israel bonds.

43. In or about March or April, 1973, both Nathan Engel and Michael Engel became employed by Oscar Gruss & Son ("Oscar Gruss") another securities broker, which at that time established an Israel bond department and began making a market for Israel bonds. Nathan Engel went to Israel to manage Oscar Gruss' Israeli office and Michael Engel went to Oscar Gruss' New York office to open and operate the bond department.

44. In or about April 1973, Oscar Gruss disseminated a letter to numerous persons and entities, including former customers of Brager, calling their attention to the fact that Michael Engel was employed by Oscar Gruss and would be specializing in Israel securities and bonds.

45. In or about spring 1973, Michael and Louise Abramoff took over the management and control of Brager.

46. Through the end of 1972, neither Michael Abramoff, Brager's current president and one of its directors, nor his wife, Louise, Brager's vice president and one of its directors, were in any way involved with Brager's trading of Israel bonds; their exclusive domain was trading of American securities.

47. Since April 1973, Louise Abramoff has been Brager's "chief trader" in Israel bonds; it is she, not Michael who sits at the Israel bond trading desk.

48. Louise Abramoff, Brager's trader, testified that she did not know whether Brager paid higher or lower prices, on any given day, than any other broker in the secondary market.

49. At American Bank & Trust Company, Brager had a line credit of $300,000. The interest rate for any extensions of credit thereunder was 1% above broker's prime. On April 2, 1973, this line of credit was renewed in full until April 30, 1974.

50. In the fall of 1975, American Bank & Trust Company learned that Brager was in the possession of a "signature guarantee" stamp belonging to the bank and that the name of a bank officer was being affixed to that stamp without the bank's knowledge or approval. Brager was requested to return the stamp, which it did, and the bank thereupon terminated Brager's line of credit and demanded repayment of the then outstanding loan.

51. The amount of Brager's net capital restricted the amount of Israel bond inventory that Brager could acquire and maintain. Commencing in 1973, Brager had difficulties maintaining the minimum amount of net capital necessary for it to remain in business.

52. During 1973 Brager's net worth decreased by $336,484. It had a loss of $328,195, almost one-third of which resulted from Brager's trading in American secur-

ities. Louise Abramoff's trading account for 1973 showed a loss of $73,881.34.

53. Between January 1, 1973 and the end of April 1973, Brager's net capital dropped from $148,000 to $50,000. Those losses were mainly due to trading losses in American securities.

54. During 1974, Brager's net worth diminished by $336,484. Between January 1, 1973 and the end of April 1973, Brager's net capital dropped from $148,000 to $50,000.

55. Brager's net capital compliance difficulties were also increased by transactions that Brager engaged in for the personal benefit of the Abramoffs.

56. In 1972, Hillel Kook commenced an action against Michael Abramoff and others in the Supreme Court of the State of New York in connection with the agreement pursuant to which Abramoff acquired control of Kook. In settlement thereof, Abramoff caused Brager to execute five (5) promissory notes totalling $75,000 to the order of the Japhet Bank. The notes were for $15,000 each and were due on May 1, of 1973, 1974, 1975, 1976 and 1977. To insure that Brager had funds to pay these notes when due, Mr. Abramoff executed five promissory notes in the amount of $15,000 payable to Brager on the same dates as Brager's notes were payable to the Japhet Bank. The notes were discounted by the Japhet Bank for $60,000 and the proceeds were paid to Mr. Kook. The notes were made by Brager because Mr. Kook refused to accept promissory notes from Mr. Abramoff. This transaction resulted in Brager's incurring $75,000 in liabilities without any corresponding increase in its assets.

57. This transaction resulted in Brager's incurring a $75,000 liability without any corresponding increase in its assets for purposes of computing its ratio of aggregate indebtedness to net capital under Rule 15-c of the Securities Exchange Act. Brager's liability on these notes for purposes of computing its net capital was a continual source of disagreement between Mr. Abramoff and NASD, which insisted that the debt on the notes be included as a liability in Brager computation of its net capital.

58. Although the $75,000 indebtedness which Brager incurred on Abramoff's behalf had to be included as a liability in computing Brager's ratio of aggregate indebtedness to net capital pursuant to Rule 15c-3 under the Securities Exchange Act of 1934, Brager was not allowed by the SEC to include Abramoff's $75,000 indebtedness as an asset of Brager for the purpose of computing that ratio.

59. In discussions and correspondence with the NASD staff in 1973, Abramoff attributed Brager's net capital difficulties to the $75,000 indebtedness, losses from trading in American securities and the inventory position of Brager in certain Israeli securities.

60. On August 8, 1974, because of the difficulty Brager was having in meeting the net capital requirements, it applied to the SEC for permission to exclude a portion of the $75,000 debt as a liability in computing its net capital. That application was denied in 1975.

61. In 1973, Mr. Abramoff relocated Brager's office to a five-story brownstone at 12 East 80th Street, in Manhattan, just off Fifth Avenue notwithstanding the fact that Brager had recently moved from Wall Street to 767 Fifth Avenue.

The landlord of Brager's new building was and remains today Milo Real Estate Corporation, an entity which was then owned and controlled by Louise Abramoff and Meyer Abramoff, Michael Abramoff's father. Brager had no lease with Milo Real Estate Corporation but nevertheless from time to time made substantial prepayments of rent even though Brager was at those times having problems in maintaining sufficient net capital to comply with the net capital rules of the NASD.

62. The East 80th Street brownstone is also the residence of Mr. and Mrs. Abramoff, who occupy two floors of that building. They pay no rent nor do they pay for the use of any gas or electricity. The Abramoffs substantially increased Brager's expenditures for furniture, fixtures and travel and entertainment. Moreover, they obtained a loan from the Chase Manhattan Bank in favor of Milo Real Estate Corporation which was secured by a certificate of deposit belonging to Brager.

63. Brager's rental expenses for the years 1971-1976 were as follows:

1971	$12,273
1972	24,120
1973	30,314
1974	24,883
1975	23,506
1976	28,980

64. In 1975, Brager expended $35,920 for furniture fixtures and improvements on the East 80th Street premises. These expenditures were made while Brager had severe capital problems.

65. In January 1974, the Abramoffs caused Brager to pledge a certificate of deposit in the amount of $25,000 with the Chase Manhattan Bank as collateral for a loan made by that bank to Milo Real Estate Corporation.

66. Brager, while managed by the Abramoffs was under constant supervision by the National Association of Securities Dealers, Inc. ("NASD"); was experiencing severe net capital deficiencies; and was requested to, by the NASD, and did, suspend its operations on several occasions.

67. During the period from in or about March 1973 to the present, Brager's management on several occasions has been guilty of and has admitted violating the rules of Fair Practice of the NASD.

68. On four separate occasions, Mr. Abramoff acknowledged that Brager had violated the NASD rules of Fair Practice, including the operation of a brokerage business while in violation of the net capital rule.

69. Brager, while managed by the Abramoffs, was under the constant supervision of staff members of the NASD.

• • •

72. On or about March 16, 1976, Mr. Heisler, a manager of the branch of Chase Manhattan Bank at which Brager did business, and Ms. Cynthia Swank, a staff credit officer of Chase Manhattan Bank, visited Brager's premises and discussed the possibility of Brager obtaining a line of credit from that bank in connection with Brager's Israel bond business. Chase Manhattan denied Brager a line of credit.

73. In 1962, Leumi Securities commenced its business operations at 60 Broad Street in New York City. Thereafter in the early 1970's it moved its offices to 18 East 48th Street, where it is presently located. This location is approximately one city block from the principal office of Leumi-New York and Leumi-New York's Latin American Department.

• • •

75. Neither Leumi-Israel nor Leumi-New York has ever been a market maker for State of Israel bonds.

76. Neither Leumi-Israel nor Leumi-New York has ever held itself out as, or has been, a competitor of Leumi Securities in the secondary market for Israel bonds.

77. Leumi-New York does not maintain actual or beneficial control over a large inventory of Israel bonds.

78. During the years immediately after its incorporation in 1962 until in or about 1967, Leumi Securities was engaged principally in the trading of American and Israel securities and not of Israel bonds.

79. From 1962 until in or about 1965, Leumi Securities traded for its own account and for the accounts of customers in American securities and Israel securities and purchased and sold Israel bonds, but only on a limited scale.

80. During the period from 1962 until in or about 1967, the so-called secondary market for Israel bonds was relatively small since the Development Corporation for Israel, the American underwriter of Israel bonds for the Israel Government, had not sold a large volume of bonds to the public in the primary market. Consequently, few bonds were offered for sale in the secondary market.

81. According to Leumi Securities' statements of income for the years 1963-1965, Leumi Securities had the following net incomes for the indicated years:

Year	Leumi Securities' Net Income
1963	$ 3,144.18
1964	7,524.15
1965	13,786.34

Leumi Securities' gross trading profits (which includes American and Israeli securities and Israel bonds), commissions and total revenue for that period were as follows:

Year	Gross Trading Profit*	Commissions	Underwriting Income	Total Revenue
1963	$48,342.48	$47,593.38	—	$102,953.82
1964	25,084.36	83,556.60	—	123,399.91
1965	57,945.74	60,751.15	—	149,157.37

Commission income does not include Israel bond trading, since such trading is done on a principal basis for Leumi Securities' own account. Thus, profit from Israel bond activities reflected in the trading profit category.

82. In 1966, Leumi Securities suffered a trading loss of $135,329.04.

83. On October 28 and November 3, 1966, two subordinated loan agreements between Leumi Securities as borrower and Leumi-Israel as lender were executed in the

* This gross trading profit figure reflects all profits earned by Leumi Securities in trading for its account, and included Israeli and American securities and Israel bonds.

amounts of $100,000 and $60,000, respectively. On October 28, 1967 and November 3, 1967, the two loan agreements were renewed.

84. In 1967, Leumi Securities increased its position in Government of Israel Securities and increased its holdings of Israel bonds to approximately $250,000.

85. Notwithstanding its decision to attempt to stabilize the Israel Bond market at or about the critical time of the 1967 Middle East hostilities, Leumi Securities' principal activity was still the trading of equity securities. During the period from 1962 when Leumi Securities commenced its operations until in or about the end of 1969, the great majority of Leumi Securities' revenues, came from areas such as commission income and underwriting income, other than trading profits in Israel bonds or any other securities.

86. During the period from 1967 to 1969, Leumi Securities continued to do business in a variety of areas and did not concentrate in Israel bonds. For the years 1967-1969, Leumi Securities' total revenue, commission and underwriting income, trading profit, and net income were as follows:

Year	Total Revenue	Commission and Underwriting Income	Gross Trading Profit	Net Income
1967	$195,712.59	$ 89,308.51	$52,817.04	$16,353.94
1968	271,549.24	164,644.13	67,009.54	52,574.82
1969	233,017.73	142,233.18	26,433.14*	(22,462.93)**

* The fact that Leumi Securities showed a gross trading profit in a year when it suffered a net loss indicates that in trading for its own account, including Israel bonds, Leumi Securities was not operating at a loss.

** The loss in 1969 was the result of a general decline in the brokerage industry in that year. A further loss in 1970 was also attributable to a general market decline.

Appendix B

In 1970, 1971 and 1972, Leumi Securities had the following trading profit, commission income, total revenue and net income:

Year	Trading Profit	Commission Income	Total Revenue	Net Income
1970	$ 12,478	$117,600	$178,371	($115,551)*
1971	156,742	220,723	467,138	93,277
1972	216,611	255,748	487,463	169,140

87. When Leumi Securities suffered losses in the late 1960's, serious thought was given to terminating its existence.

88. In 1969 and 1970 senior officers of Leumi-Israel became concerned that Leumi Securities was doing a heavy business in American Securities and was not fulfilling its basic underlying purpose of promoting the sale of Israeli securities in the United States.

89. As a result of these concerns having been expressed a committee was appointed by Mr. Japhet, Chairman of Leumi-Israel, to review and discuss the future method of operation of Leumi Securities. The committee decided:

> 1. To call upon the management of the company to furnish the management of Bank Leumi with its budgetary estimates and estimates of the level of profitability vis-a-vis two alternatives for the continuance of the company's operations, by 1st of February 1971.

---

* The 1970 loss was attributable to a general decline in the securities market.

(a) Continuance of the execution of security buy and sell orders for the B.L.L. group with the following range of commissions:

BLL* $90,000, CIFICO** $30,000, Union Bank $25,000 total, $145,000 per year; (this is including BLL shares) and increasing the field of action of the investment clubs.

(b) Restrictions of the company's activities to Israeli activities only, i.e. development of the bond market, sale of Israeli securities (including B.L.L. shares) and increasing the development of investment clubs.

The estimate must be based on detailed particulars—including the number of employees according to grades and salaries, rent, computer expenses, the number of transactions of each type, telex and telephone expenses, etc.

2. Immediately after receipt of the figures, a final decision must be made and carried out.

90. In a separate memorandum dated November 10, 1970, Dr. Y. Kadishay, a member of the committee and the Manager of Leumi-Israel's Foreign Department advised Mr. Japhet as follows:

Further to and in light of the decision of the "Leumi Securities" Committee attached hereto, I wish to add that in the opinion of the Foreign Department it is desirable:

---

* B.L.L. refers to Leumi-Israel.

** Refers to Leumi-Israel's subsidiary bank in Switzerland.

1) That you personally instruct the Company's LSC's Management to cease immediately its activities in dealing with American Securities and to liquidate its investment portfolio.

2) In view of the anticipated reduction in the Company's activities, it is necessary to take the required steps to replace the Company's manager.

3) To insist that the timetable fixed by the Committee will be strictly adhered to, and if possible, brought forward.

4) Upon receipt of the estimates of the Company's management, it will be desirable to ask separately for the opinions of Messrs. Silverstone, Arbib, Schloss and Einhorn in order to reach a final decision.

91. In or about late 1970 or early 1971, a decision was reached that Leumi Securities should withdraw from transacting business related to American securities and the American market. The basic purposes of Leumi Securities were to sell Israeli securities and foster an interest on the part of Americans in the Israel economy. The American business was not profitable for Leumi Securities.

92. Both before and after the decision to withdraw from American securities and American market activities in or about 1970, Leumi Securities made and continues to make vigorous efforts to interest American investors in making equity investments in Israel. In this regard, Leumi Securities has and continues to expend considerable time, effort and money in connection with the servicing and formation

of investment clubs which are interested in purchasing Israeli securities traded on the Tel Aviv Stock Exchange.

93. Leumi Securities devoted substantial effort to the promotion of Israel Investment Clubs. The purpose of Leumi Securities promoting and assisting Israel Investment Clubs was to sell Israeli equity securities, not Israel bonds. Investment clubs did not normally buy and sell Israel bonds, and were not formed for that purpose. The promotion of investment clubs, and the servicing of investment clubs after they were formed, involved travelling to different cities in the United States for meetings with representatives of Jewish organizations and potential investment club officers and members. Even as the secondary market for Israel bonds grew, Leumi Securities continued its efforts to form and assist Israel Investment Clubs through synagogues, men's clubs and various Jewish organizations.

94. When Cedric Olivestone assumed the position of Vice President of Leumi Securities in May 1972, he was advised that Leumi Securities was established on a business basis.

96. While the Israel bond market was growing, the Israel securities market was declining, because of external factors, both economic and political. In October 1973, the war in the Middle East generated massive economic dislocations in Israel which had a severe adverse effect on the Israel equity security market.

97. In or about October 1974, Leumi-New York opened a limited facility at the El Al terminal in the JFK Airport.

The limited facility provides tourists with financial information about Israel.

98. Leumi Securities does not and has not employed anyone at Leumi-New York's facility or the El Al terminal at Kennedy Airport.

99. Leumi-New York neither trades, buys or sells Israel bonds at the El Al terminal facility at the JFK Airport.

100. The decision to establish the limited facility at the El Al Terminal was in no way related to the activities of Leumi Securities.

101. The Leumi-New York facility in the El Al terminal at Kennedy Airport was organized for the primary purpose of providing convenience to the travelling public by affording them a means for redeeming Israel bonds in limited amounts here in the United States prior to boarding the plane, and for exchanging limited amounts of dollars into Israel currency.

102. Leumi-New York's Latin American Department sometimes refers customers to Leumi Securities because of its proximity of location.

103. Leumi-New York has never subsidized or otherwise provided funds to Leumi Securities.

104. From time to time, Leumi Securities was afforded an unsecured line of credit by Leumi-New York up to $100,000. Leumi Securities paid interest on all of its outstanding loans and eventually paid off all of such loans.

105. Leumi-New York's loans to Leumi Securities have been predicated on a thorough evaluation of Leumi Securities and its financial status by Leumi-New York's Credit Committee.

106. Prior to the creation of the line of credit with First Israel, Leumi Securities had had an unsecured line of credit in the amount of $100,000 with the New York branch of Leumi Israel.

107. Leumi Securities and Leumi-New York participate in a joint pension plan. Leumi Securities pays for the participation of its employees in the plan and Leumi-New York does not pay any funds to the pension plan on behalf of Leumi Securities.

108. Leumi Securities had a secured line of credit with Bank Leumi le-Israel, B.M., Tel Aviv, commencing in 1973.

109. The rate of interest paid by Leumi Securities on its March 1973 line of credit with Leumi-Israel was at a higher rate (i.e., the Eurodollar rate) than Leumi Securities could have obtained for a similar line of credit in New York.

110. In connection with this line of credit, Leumi Securities was not given special treatment.

111. Prior to 1973, Leumi Securities had had a $60,000 permanent line from Leumi Israel on which it drew from time to time.

112. From time to time, prior to 1973, Leumi Securities would take a collateral loan from the New York Agency of

Leumi-Israel. The security for such loans was American securities, Israeli securities and Israel bonds, depending on the particular loan in question. Leumi Securities paid the prevailing rate of interest on such loans for a company in its financial condition. All drawdowns on this line with the New York Agency were repaid.

113. No money was borrowed by Leumi Securities from the New York Branch or Agency of Leumi-Israel after 1973.

114. From 1962 to date, Leumi-Israel has executed trades of Israeli securities on the Tel Aviv Stock Exchange on behalf of Leumi Securities. Leumi-Israel has always charged Leumi Securities similar rates of commission to those that it charged other broker-dealers, including Brager, for executing similar sized trades.

115. Throughout the entire time that Leumi Securities was a market maker for Israel bonds, one person determined the prices at which it could buy or sell Israel bonds —its manager. The manager of Leumi Securities did not consult with Leumi Securities' board of directors or with Leumi-Israel or Leumi-New York or receive instructions or advice from these entities in determining the prices for investment or tourist bonds.

116. In 1974 and 1975, Leumi Securities paid Leumi-Israel, its sole stockholder, a dividend of $70 per share, totalling $35,000 per year.

118. In 1974, Messrs. Japhet, Kadishay, Tulchinsky and Porath, senior officers of Leumi-Israel, furnished consulting services to Leumi Securities on a variety of matters relat-

ing to its business. Leumi Securities was billed and it paid $30,000 to Leumi-Israel for these consulting services. The board of directors of Leumi Securities approved the payment by Leumi Securities of these consulting fees to Leumi-Israel.

119. In 1974, and continuing through 1975 and 1976, the Israeli securities business continued to decline. The financial results of Leumi Securities reflect these changes that occurred in the market. Whereas, in earlier years, Leumi Securities' revenues came mostly from areas other than Israel bonds. Beginning in 1973, trading profits from Israel bonds became a more significant part of Leumi Securities' earnings picture. Leumi Securities' results from 1973, 1974, 1975 and 1976 were:

	Trading Profits (State of Israel Bonds) (Gross Figures)	Commission Income	Other Revenue
1973	$221,157	$100,070	$55,321
1974	340,839	74,846	66,959
1975	322,044	83,075	34,115
1976	342,443	76,579	26,635

Leumi Securities' net income during these years was as follows:

	Net Income
1973	$32,584
1974	63,149
1975	31,628
1976	31,773

• • •

121. Leumi-Israel and its subsidiaries, other than Leumi Securities, did a large amount of securities trading through United States brokers other than Leumi Securities.

Appendix B

122. Bank Leumi le-Israel, B.M. (Israel)

Securities Transactions With American Brokers

	1973	1974	1975	1976	1977 (6 months)
Loeb Rhoades	$4,212,200	$3,838,500	$7,979,200	$9,858,900	$3,104,900
Weis, Voisin	3,319,900	—	—	—	—
Leumi Securities	None	None	None	None	None

123. Between 1972 and 1976, Bank Leumi le-Israel (France) S.A., a subsidiary of Bank Leumi le-Israel, B.M., transacted a total of $12,640,500 worth of securities business through American brokers. Only $60,100 of this total was through Leumi Securities.

124. Between 1975 and 1976, Bank Leumi le-Israel (Switzerland) S.A., a subsidiary of Bank Leumi le-Israel, B.M., transacted $26,553,100 of securities business with American brokers. None of this business was transacted through Leumi Securities.

125. Between 1972 and November 30, 1977, Union Bank of Israel, Ltd., a subsidiary of Bank Leumi le-Israel, B.M., transacted $12,228,200 of securities business with American brokers. None of this business was done through Leumi Securities.

126. Bank Leumi le-Israel (United Kingdom), a subsidiary of Leumi le-Israel, B.M., did not purchase any State of Israel bonds for its customers.

127. From 1974 to 1976, Bank Leumi le-Israel's (France) total purchases of Israel bonds for its customers through

Leumi Securities was $54,000, as follows: $2,000 of tourist bonds in 1974, $2,000 of investment bonds in 1975, and $50,000 of investment bonds in 1976.

128. During the period from in or about 1962, when Leumi Securities was organized, until in or about March or April 1973, Leumi-Israel and Leumi Securities had a good relationship with Brager.

129. Shortly after the formation of Leumi Securities, Leumi-Israel in or about September 1962, extended a line of credit to Brager for $100,000.

130. In 1965-1966, at Leumi-Israel's then New York Branch, Brager borrowed as much as $365,000.

131. In 1967 and continuing thereafter until in or about 1971, both Leumi Securities and Leumi-Israel engaged in numerous transactions with Brager including the purchase of Israel bonds. During this period of time, Brager's management maintained a close business and personal relationship with various members of the management of Leumi-Israel.

132. During this period of time from in or about 1967 until in or about the end of 1971, in addition to the purchase and sale transactions between Brager and Leumi Securities and between Brager and Leumi-Israel in connection with Israel bonds, there were joint ventures among the three companies in connection with the purchase of securities.

133. During the period from in or about 1967 through in or about 1971 Leumi-Israel did not transact all of its Israel bond business through Leumi Securities, but rather used other broker/dealers and Brager as well.

134. During the period from in or about 1967 through in or about 1971, Leumi-Israel did not transact all of its Israel bond business through Leumi Securities, but, rather, transacted such business through Brager as well.

135. During the period through the end of 1972, Brager continued to have an excellent relationship with Leumi-Israel. For example, Nathan Engel met on various occasions with senior Leumi-Israel personnel to discuss the operations of Leumi Securities and the difficulties Leumi Securities was encountering in the operation of its business. During these meetings, Engel suggested various methods by which Leumi Securities could improve its business.

136. In April 1973, Zalman Segal was an officer of Leumi-New York and was also a member of the Board of Directors of Leumi Securities. In or about April 1973, a meeting was held among Cedric Olivestone, Zalman Segal, and Michael Abramoff who was acting on behalf of Brager and Company. The meeting had been arranged by Mr. Olivestone with knowledge of the Leumi Securities Board of Directors and, *inter alia,* dealt with whether Brager was interested in selling the Israeli side of its business and with Brager's owning an account at First Israel Bank and Trust Company of New York ("First Israel"), now Leumi-New York, and with a possible extension of a line of credit or a loan by First Israel to Brager.

137. The April meeting did not get into details concerning Mr. Abramoff selling a portion of Brager's business. Mr. Abramoff said that he would prefer to take the matter up with Mr. Einhorn (a Leumi-Israel senior officer) when he visited Israel, which was to be within the next few weeks.

Mr. Abramoff did, in fact, meet with Mr. Einhorn in Tel Aviv. Nothing came of their discussions. At that meeting in Israel, Mr. Einhorn asked Mr. Abramoff why he was interested in selling Brager so soon after he acquired it. At a 1973 meeting with Mr. Einhorn in Tel Aviv Mr. Abramoff said that he buys companies having difficulty, improves them and then sells them.

* * *

139. After the April meeting, Mr. Olivestone, Leumi Securities Vice President, personally introduced Mr. Abramoff to David Crohn, an officer of First Israel, in connection with Brager's having opened an account at First Israel.

140. A loan of $50,000 was in fact extended to Brager by First Israel at this time.

141. In 1973, after the April meeting referred to in paragraph 137 above, a symposium on investments in Israel, sponsored by Leumi Securities, took place at the offices of Leumi-New York. The Abramoffs who were then Brager's management, were invited and in fact attended. In addition to the Abramoffs, other market makers in Israeli securities and Israel bonds were invited to the symposium and representatives of certain of those firms attended.

142. In September 1973, Cedric Olivestone, then the Vice President and Manager of Leumi Securities, was consulted by Rainer Esslen, who subsequently authored a book entitled *How to Buy Foreign Securities: The Complete Book of International Investing* (New York 1974). Cedric Olivestone was asked by Mr. Esslen to provide in-

formation relating to Israeli securities and Israel. Mr. Olivestone identified Brager as broker-dealer specializing in Israeli securities and Mr. Esslen printed that information in his book.

143. Leumi Securities, in 1974, published a pamphlet entitled "How To Invest in Israeli Securities". That pamphlet reprinted, with permission of Mr. Esslen's publisher (Columbia Publishing Company, Inc.), that chapter of Mr. Esslen's book relating to investments in Israel. In that pamphlet there was reprinted verbatim the list of brokers (Columbia Publishing Company, Inc.), that chapter of Mr. Esslen's book relating to investments in Israel [sic]. In that pamphlet there was reprinted verbatim the list of brokers accepting orders for Israeli securities traded only in Israel, including Brager. Leumi Securities placed copies of this pamphlet in its public waiting room, where it was made available to the public. This pamphlet was distributed to customers and potential customers of Leumi Securities at least until 1976.

144. In June 1974, a credit inquiry was made of Leumi-New York by American Bank & Trust Company relating to Leumi-New York's experience with the Brager account. In reply to this inquiry, Leumi-New York said the following:

> We have had this account since April 4, 1973. They are maintaining satisfactory compensating balances. They borrow from us on an offering basis secured by marketable securities. The High Point was reached to $50M in April 1973 and the current outstanding is a $46M. We have guarantee of Michael Abramoff. Satisfactory experience.

145. In a subsequent credit check in February 1975 by American Bank & Trust Company, the following information was imparted to it by Leumi-New York:

> The subject has maintained an account with us since April 1973 and balances have been satisfactory. They had borrowed on an offering basis for clearance purposes, but they stopped with us in 1973. Our other $46M demand secured loan was paid off on May 10, 1974 and was not outstanding when you checked with us in June of last year. Our experience has been satisfactory.

146. In or about early 1974 the certified public accounting firm of Teichner & Swerlin, issued a qualified year-end financial statement for Brager for the period ending December 1973.

147. In or about the Spring of 1974 Leumi-New York requested Brager to furnish it with the year-end balance sheet for the period ending December 1973. However, Brager did not submit this qualified statement to Leumi-New York and its account was closed in or about May 1974.

148. Very shortly after Mr. Abramoff acquired an interest in Brager, he began to contemplate an action against Leumi-Israel and Leumi Securities for alleged violations of the antitrust laws. Mr. Abramoff began to discuss such an action with others as early as 1972. Mr. Abramoff, through 1973, continued to "research and conceptualize" his contemplated action.

149. In June 1974, Brager's then counsel, the firm of Charney & White, prepared and delivered to defendants'

counsel a draft complaint alleging antitrust law violations similar to those asserted in this action. That draft complaint was conceived, conceptualized and drafted by Abramoff.

• • •

151. Mr. Abramoff failed to make payment to Mr. Engel pursuant to the agreements referred to in 144 above. Mr. Engel brought suit against Mr. Abramoff in the Supreme Court of the State of New York, County of New York, to recover the unpaid amounts. Mr. Abramoff predicated his opposition to that action on various grounds, which included the damage Brager's business had suffered as a result of actions engaged in by Mr. Engel alone, and by Mr. Engel in conspiracy with the Japhet Bank. Mr. Abramoff claimed that these actions by Mr. Engel and the Japhet Bank paralyzed Brager.

• • •